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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. ~~1083~~ 60

C. J. HENDRY COMPANY AND FRANK SEMATOVICH,
Appellants,

vs.

E. C. MOORE, I. ZELLERBACH, AND A. T. JERGENS, AS THE FISH AND GAME COMMISSION OF THE STATE OF CALIFORNIA,

---

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA.

STATEMENT OPPOSING JURISDICTION.

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Attorney General of California;
EVERETT W. MATTOON,
Assistant Attorney General of California;
EUGENE M. ELSON,
Deputy Attorney General of California,
Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1083

E. C. MOORE, I. ZELLERBACH, A. T. JERGENS, AS THE FISH AND GAME COMMISSION OF THE STATE OF CALIFORNIA,

Petitioners and Appellees,

vs.

PURSE SEINE NET, APPROXIMATELY 325 FATHOMS LONG, 32 FATHOMS DEEP, APPROXIMATE SIZE OF MESH FIVE TO EIGHT INCHES,

Respondent,

C. J. HENDRY COMPANY, A CORPORATION, AND FRANK SEMATOVICH,

Claimants and Appellants.

APPELLEES' STATEMENT OPPOSING JURISDICTION.

Statement.

The appellees herein named, as members of the Fish and Game Commission of the State of California, respect-

fully present the following matters against the jurisdiction of this Honorable Court asserted by appellants.

We do not contest appellants' assertion that during the entire progress of this case in the State courts, there was "drawn into question the validity of" Section 845 of the Fish and Game Code of the State of California, "on the grounds of its being repugnant to the Constitution, . . . or laws of the United States." Nor do we contest the assertion that "the decision (herein appealed from) is in favor of its validity." However, we oppose the jurisdiction of this Court to review this case, upon the ground that the decisions of this Court, cited in the opinion of the Supreme Court of the State of California, sustain the decision of that court, to the effect, that the remedy prescribed by Section 845 of the Fish and Game Code of the State of California, is a remedy of a type recognized at common law, and therefore by virtue of the saving clause contained in Sections 24(2), 256 Judicial Code, (28 U. S. C. A. Sec. 41, subd. 3, Sec. 371) may properly be pursued in the State court.

Neither do we dispute the "Facts" of the case, nor the statement of the "Proceedings whereby the Federal question was raised and determined", stated by appellants under Point IV of their Statement of Basis of Appellate Jurisdiction in this Court.

Section 845 of the Fish and Game Code of the State of California reads as follows:

> "845. Any net used for taking fish in violation of the provisions of this chapter is a public nuisance. It is the duty of every person authorized to make an arrest for the violation of any provision of this code to seize and keep such net and report such seizure to the Commission. The commission must commence proceedings in the superior court of the county or city and county in which the seizure is made by petitioning said court

for a judgment forfeiting such net. Upon the filing of such petition, the clerk of said court shall fix a time for the hearing thereof and cause notices to be posted for fourteen days in at least three public places in the town, city, or city and county, where the court is held, setting forth the substance of such petition and the time and place fixed for its hearing. At such time the court must hear and determine said proceeding, and upon proof that such net was used in violation of this chapter must order the same forfeited. Any net so forfeited shall be sold or destroyed by the commission. The proceeds from all such sales shall be paid into the State treasury to the credit of the fish and game preservation fund."

Article III, Section 2, clause 1 of the Constitution of the United States, so far as material here, reads as follows:

"The judicial power shall extend * * * to all cases of admiralty and maritime jurisdiction * * *"

Pursuant to that constitutional grant, the Congress of the United States in the year 1789, adopted what has since been enacted into Section 256 of the Judicial Code (28 U. S. C. A. sec. 371), reading in part as follows:

"The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States:

"* * *

"* * *

"Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it. * * *"

By Section 24 of the Judicial Code as amended, (28 U. S. C. A. Sec. 41) original jurisdiction of such causes is given to the District Courts of the United States.

The Supreme Court of California held that the proceeding in question; an action to forfeit a net, used unlawfully to take fish in the territorial waters of the State of California, which action is provided for in Section 845 of the Fish and Game Code, supra, involved "a maritime cause of action"; but that the remedy for forfeiture provided for in that section, was "of a type recognized at common law", and that therefore concurrent jurisdiction between the State court and the admiralty court existed by virtue of the clause, "saving to suitors in all cases the right of a common law remedy where the common law is competent to give it • • •" No authorities are cited by appellants to dispute the proposition stated by the Supreme Court of California, and supported by numerous decisions of this court, that "If the action is of a type that was cognizable in both admiralty and common law courts the state courts retain a concurrent jurisdiction with the federal admiralty courts to entertain the action." Nor do appellants dispute the statement in the decision of the Supreme Court of California, that "The fact that federal forfeiture statutes, similar to that of California, require that a proceeding thereunder against a vessel or its equipment be brought in a federal district court sitting as a court of admiralty • • • (citing cases) • • • does not prevent California from conferring jurisdiction upon her courts to proceed with such cases under a California statute if the type of action is a traditional common law remedy."

What appellants do dispute, as we understand it, is the next conclusion reached by the Supreme Court of California, that "the forfeiture of illegally used nets authorized by the California statute involves a traditional common law remedy cognizable in the state courts. • • •"

In reaching that conclusion the Supreme Court of California proceeded upon the following stated principles:

1. That when Section 9 of the Judiciary Act of 1789 was adopted, there had been little development of the common law in federal or state courts and that therefore it became necessary to examine the English common law as it existed before 1789.

2. In determining the jurisdiction of English common law courts, acts of Parliament defining that jurisdiction must be taken into account and that in California the common law of England includes not only the lex non scripta but also the written statutes enacted by Parliament.

Martin vs. *Superior Court*, 176 Cal. 289, (168 Pac. 135; L. R. A. 1918D, 313);

People vs. *Richardson*, 138 Cal. App. 404, (32 Pac. (2d) 433).

3. Though the present proceeding is in rem against the thing itself, that fact does not of itself, constitute the action one of a type unknown to the common law, in that actions in rem have long been permitted in common law courts for the forfeiture of goods used in violation of laws imposing such a penalty, even though the articles thus proceeded against are ships, appurtenances thereof, or cargoes, citing English statutes and cases.

4. That the Federal cases recognize such forfeiture proceeding a valid remedy at common law, citing the following cases:

The Palmyra, 12 Wheat. 1;

United States vs. *Five Boxes of Asafoetida*, 181 Fed. 561;

The Sarah, 8 Wheat. 391.

5. That certain cases stating that an in rem action against a vessel is not a common law remedy, and therefore within the exclusive admiralty jurisdiction of the Federal

Courts are concerned with types of in rem proceedings that were foreign to the common law, citing the following cases:

The Moses Taylor, 4 Wall. 411;
The Hine vs. *Trevor*, 4 Wall. 555;
The Glide, 167 U. S. 606;
The Belfast, 7 Wall. 624.

6. That therefore the present action is of a type cognizable in the common law courts; is a common law remedy which the common law is competent to give and therefore within the saving clause of Section 256, Judicial Code, supra.

The authorities contained in appellants' statement do not conflict with the conclusions reached by the Supreme Court of California. The argument of appellants is simply this: that because this proceeding is in rem against a part of a vessel on navigable waters it is "according to the course of admiralty" and may therefore be instituted only in a federal court of admiralty, and that upon the authority of *The Moses Taylor*, supra, *The Hine* vs. *Trevor*, supra, and *The Glide*, supra, the proceeding is not one known to the common law and therefore not within the saving clause of Section 256, Judicial Code, permitting it to be brought in the state court. We submit that those cases speak for themselves and are, as stated by the Supreme Court of California, concerned, not with an in rem proceeding such as this —known to the common law—but on the contrary are concerned with an in rem proceeding unknown to the common law. They settle the question therefore that there is not drawn into question here anything not already decided by this court; hence the absence of a substantial federal question.

Directly in point on the question of jurisdiction; that the proceeding here involved is not of a type of in rem proceeding that must be prosecuted in a court of admiralty, is

Smith v. *Maryland*, 59 U. S. 71 (1855). In that case it appeared that the plaintiff in error, a citizen of the State of Pennsylvania, was the owner of a sloop licensed to be employed in the coasting trade and fisheries, and that said vessel was seized by the sheriff of a county in Maryland, while engaged in dredging for oysters in Chesapeake Bay, and that the vessel was condemned to be forfeited to the State, by a Justice of the Peace of that State before whom the proceeding was had. The Maryland statute in question, as quoted in the opinion on page 73, provided as follows:

> "* * * That it shall be unlawful to take or catch oysters in any of the waters in this State with a scoop or drag, or any other instrument than such tongs and rakes as are now in use, and authorized by law; and all persons whatever are hereby forbid the use of such instruments in taking or catching oysters in the waters of this State, on pain of forfeiting to the State the boat or vessel employed for the purpose, together with her papers, furniture, tackle, and apparel, and all things on board the same.'"

Speaking with reference to State waters, and the control by the State thereof, the court said on page 75:

> "The state holds the propriety of this soil for the conservation of the public rights of fishery thereon, and may regulate the modes of that enjoyment so as to prevent the destruction of the fishery. In other words, it may forbid all such acts as would render the public right less valuable, or destroy it altogether. This power results from the ownership of the soil, from the legislative jurisdiction of the State over it, and from its duty to preserve unimpaired those public uses for which the soil is held. Vattel, b. 1, c. 20, s. 246; Corfield v. Coryell, 4 Wash. R. 376. It has been exercised by many of the States. See Angell on Tide Waters, 145, 156, 170, 192-3."

On page 75 the court continued:

> "So much of this law as is above cited may be correctly said to be not in conflict with, but in furtherance of, any and all public rights of taking oysters, whatever they may be; and it is the judgment of the court, that it is within the legislative power of the State to interrupt the voyage and inflict the forfeiture of a vessel enrolled and licensed under the laws of the United States, for a disobedience, by those on board, of the commands of such a law. To inflict a forfeiture of a vessel on account of the misconduct of those on board,—treating the thing as liable to forfeiture, because the instrument of the offense is within established principles of legislation, which have been applied by most civilized governments. The Malek Adhel, 2 How. 233-4, and cases there cited. Our opinion is, that so much of this law as appears by the record to have been applied to this case by the court below, is not repugnant to the clause in the constitution of the United States which confers on congress power to regulate commerce."

And specifically with reference to the constitutional grant of admiralty and maritime jurisdiction, the court said on page 76:

> "It was also suggested, that it is repugnant to the second section of the third article, which declares that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction. But we consider it to have been settled by this court in United States v. Bevans, 3 Wheat. 386, that this clause in the constitution did not affect the jurisdiction, nor the legislative power of the States, over so much of their territory as lies below high water mark, save that they parted with the power so to legislate as to conflict with the admiralty jurisdiction or laws of the United States. As this law conflicts neither with the admiralty jurisdiction of any court of the United States conferred by congress, nor with any law of congress whatever, we are of opinion it is not repugnant to this clause of the constitution."

The Maryland statute involved in *Smith* v. *Maryland*, was in practical effect, identical with Section 845 of the Fish and Game Code of the State of California under consideration in this case, and it is therefore respectfully submitted that the decision in that case, is in the final analysis determinative, that no Federal question is presented in this appeal.

Smith v. *Maryland*, supra, has never been overruled but on the contrary, and with regard to the validity of state statutes similar to Section 845 of the Fish and Game Code of California, has been approved in the following decisions of this court:

McCready v. *Virginia*, (1876) 94 U. S. 391, 394;
Manchester v. *Massachusetts*, (1891) 139 U. S. 240, 260, 261, 263;
Lawton v. *Steele*, (1894) 152 U. S. 133, 138;
Lee v. *New Jersey*, (1907) 207 U. S. 67, 70.

See:
The Abby Dodge, (1911) 223 U. S. 166, 174.

Conclusion.

Appellees believe that the decision of the Supreme Court of California is supported by decisions of this Court cited therein and in particular by the decision of this Court in *Smith* v. *Maryland*, supra.

Respectfully submitted,

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